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13 UNITED STATES DISTRICT COURT  
14 EASTERN DISTRICT OF CALIFORNIA  
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17 DELORES GUTIERREZ, NO. CIV. S-03-0656 WBS/JFM  
18 Plaintiff,  
19 v. MEMORANDUM AND ORDER

20 RWD TECHNOLOGIES, INC., and  
21 DOES 1 through 50, inclusive,

22 Defendants.

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24 Plaintiff brought this action in California state court  
25 alleging: (1) violation of California Labor Code section 230; and  
26 (2) termination in violation of public policy. Defendant removed  
27 the action to this court based on diversity jurisdiction.  
28 Defendant now moves for judgment on the pleadings as to  
plaintiff's claim under section 230.

I. Factual and Procedural Background

Plaintiff Delores Gutierrez was summoned for jury duty  
on or about September 9, 2002, and plaintiff allegedly gave  
defendant RWD Technologies, Inc. reasonable notice that she was  
required to serve. (Cmpl. ¶ 7). According to plaintiff, on or

1 about October 7, 2002, defendant engaged in actions with the  
2 intent of discriminating against plaintiff because of her need to  
3 take time off for jury service. (*Id.* ¶ 6). Plaintiff alleges  
4 that defendant's discriminatory conduct resulted in plaintiff's  
5 termination on November 7, 2002. (*Id.*). Plaintiff further  
6 alleges that, as a proximate result of defendant's conduct,  
7 plaintiff has suffered: (1) loss of wages, salary, and benefits;  
8 (2) the intangible loss of employment related opportunities; and  
9 (3) humiliation, mental anguish, and emotional and physical  
10 distress. (*Id.* ¶¶ 8-10).

11                   Defendant now moves for judgment on the pleadings as to  
12 plaintiff's cause of action under California Labor Code section  
13 230 on the grounds that: (1) plaintiff cannot allege that she has  
14 exhausted the administrative procedures required by California  
15 Labor Code section 98.7; and (2) plaintiff's claim under section  
16 230 is time-barred.

17 II. Discussion

18                   Pursuant to Federal Rule of Civil Procedure 12(c),  
19 "[a]fter the pleadings are closed but within such time as not to  
20 delay the trial, any party may move for judgment on the  
21 pleadings." "Generally, district courts have been unwilling to  
22 grant a Rule 12(c) dismissal 'unless the movant clearly  
23 establishes that no material issue of fact remains to be resolved  
24 and that he is entitled to judgment as a matter of law.'" Doleman  
25 v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984)  
26 (quoting C. Wright & A. Miller, Federal Practice and Procedure:  
27 Civil, § 1368 at 690 (1969)).

28                   The same standard applies to motions made under Rule

1 12(c) as applies to motions made under Rule 12(b)(6). See 2  
2 James Wm. Moore et al. Moore's Federal Practice § 12.38 (3d ed.  
3 2002). Therefore, on a motion for judgment on the pleadings, the  
4 factual allegations of the non-moving party are taken as true.  
5 Doleman, 727 F.2d at 1482 (citing Austad v. United States, 386  
6 F.2d 147, 149 (9th Cir. 1967)). "Courts dismiss complaints under  
7 Rule 12(c) for either of two reasons: (1) lack of a cognizable  
8 legal theory, or (2) insufficient facts under a cognizable legal  
9 theory." Young v. Car Rental Claims, Inc., 225 F. Supp. 2d 1149,  
10 1153 (D. Haw. 2003).

11 California Labor Code section 230(a) provides that  
12 "[a]n employer may not discharge or in any manner discriminate  
13 against an employee for taking time off to serve as required by  
14 law on an inquest jury or trial jury, if the employee, prior to  
15 taking the time off, gives reasonable notice to the employer that  
16 he or she is required to serve."<sup>1</sup> Section 230 further provides,  
17 in pertinent part, that "[a]ny employee who is discharged  
18 . . . by his or her employer because the employee has exercised  
19 his or her rights as set forth in subdivision (a) . . . may file  
20 a complaint with the Division of Labor Standards Enforcement of  
21 the Department of Industrial Relations pursuant to Section 98.7."  
22 Cal. Lab. Code § 230(f)(1).

23 The question of whether a plaintiff must exhaust the  
24 administrative remedies available under section 98.7 before  
25 pursuing a civil claim under section 230 appears to be one of  
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27 <sup>1</sup> Labor Code section 230(e) provides remedies for  
28 violations of section 230(a), including "reinstatement and  
reimbursement for lost wages and work benefits caused by the acts  
of the employer."

1 first impression.<sup>2</sup> In California, it is well-settled that "where  
2 an administrative remedy is provided by statute, relief must be  
3 sought from the administrative body and this remedy exhausted  
4 before the courts will act." Abelleira v. Dist. Ct. of Appeal,  
5 17 Cal. 2d 280, 292 (1941); cf. Palmer v. Regents of Univ. of  
6 Cal., 107 Cal. App. 4th 899, 904 (2003) ("When a statute such as  
7 FEHA [Fair Employment and Housing Act] provides an administrative  
8 process for resolution of grievances, exhaustion of those  
9 administrative remedies is a precondition to bringing a civil  
10 suit on a statutory cause of action . . . .").

11 However, section 98.7 includes a provision stating that  
12 "[t]he rights and remedies provided by this section do not  
13 preclude an employee from pursuing other rights and remedies  
14 under any other law." Cal. Lab. Code § 98.7(f). Plaintiff  
15 contends that this provision demonstrates that employees may  
16 bring civil suits to enforce their rights in lieu of utilizing  
17 the administrative remedies provided in section 98.7. Thus, the  
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19 <sup>2</sup> In Leibert v. Transworld Sys., Inc., 32 Cal. App. 4th  
20 1693 (1995), the court, addressing Labor Code sections 1101,  
21 1102, and 1102.1 (which was later incorporated into FEHA), stated  
22 that it was "not called upon to decide whether exhaustion of the  
23 Labor Code administrative remedies is in fact a precondition to  
24 bringing a direct statutory cause of action." Id. at 1704  
25 (holding that a plaintiff is not required to exhaust  
26 administrative remedies under the Labor Code before bringing a  
27 non-statutory cause of action). In a later case, Murray v.  
28 Oceanside Unified Sch. Dist., 79 Cal. App. 4th 1338 (2000), a  
California appellate court, addressing Labor Code section 1102.1,  
stated that Leibert "imposes no requirement that [plaintiff] have  
proceeded through the Labor Code administrative procedures in  
order to pursue her statutory or nonstatutory claims." Murray,  
79 Cal. App. 4th at 1359. However, as the Murray court pointed  
out, sections 1101, 1102, and 1102.1 are silent on the issue of  
administrative remedies. See id. Section 230, by contrast,  
explicitly refers to the administrative remedies set forth in  
section 98.7.

1 court must determine whether this statutory language requires a  
2 departure from the general rule that exhaustion of administrative  
3 remedies is required when a statute provides such a remedy.

4        "The statute's plain meaning controls the court's  
5 interpretation unless its words are ambiguous." White v.  
6 Ultramar, Inc., 21 Cal. 4th 563, 572 (1999) (quoting Kobzoff v.  
7 Los Angeles County/UCLA Med. Ctr., 19 Cal. 4th 851, 861 (1998)).  
8 Section 98.7 itself does not create any substantive rights.

9 Rather, it sets forth the procedure by which employees may seek  
10 redress for violations of rights created by other, substantive,  
11 provisions of the Labor Code. See, e.g., Cal. Lab. Code  
12 § 98.7(a) ("Any person who believes that he or she has been  
13 discharged or otherwise discriminated against in violation of any  
14 law under the jurisdiction of the Labor Commissioner may file a  
15 complaint with the division . . . ."). Section 98.7 is silent on  
16 the issue of whether exhaustion of administrative remedies is  
17 required before civil suits may be brought based on the  
18 substantive sections of the Labor Code for which section 98.7  
19 provides administrative remedies.

20        Because the plain language of section 98.7 is silent as  
21 to exhaustion, the court must look to other sources to determine  
22 the proper interpretation of this section. See Torres v.  
23 Parkhouse Tire Serv., Inc., 26 Cal. 4th 995, 1003 (2001) ("[I]f  
24 the statutory language permits more than one reasonable  
25 interpretation, courts may consider various extrinsic aids,  
26 including the purpose of the statute, the evils to be remedied,  
27 the legislative history, public policy, and the statutory scheme  
28 encompassing the statute."); see also Friends of Westhaven &

1 Trinidad v. County of Humboldt, 107 Cal. App. 4th 878, 884 (2003)  
2 (stating that when a statute is ambiguous the court "select[s]  
3 the construction that comports most closely with the apparent  
4 intent of the Legislature . . .") (internal quotation and  
5 citation omitted). For the following reasons, the court is  
6 persuaded that plaintiff is required to exhaust administrative  
7 remedies before bringing a civil suit under section 230.

8 First, the statutory framework encompassing section  
9 98.7 supports defendant's position that exhaustion is required.  
10 Section 98.7 itself seems to contemplate an exhaustion  
11 requirement because it includes a provision by which an employee  
12 whose complaint before the Labor Commissioner is unsuccessful may  
13 subsequently bring a civil action. See Cal. Lab. Code  
14 § 98.7(d)(1) ("The complainant may, after notification of the  
15 Labor Commissioner's determination to dismiss a complaint, bring  
16 an action in an appropriate court . . .") (emphasis added).

17 Moreover, where the California legislature intended for  
18 an employee to be able to immediately file a civil suit under a  
19 provision of the Labor Code as an alternative to utilizing the  
20 administrative procedures set forth in section 98.7, it so  
21 indicated in explicit terms. For example, another substantive  
22 provision of the Labor Code that incorporates section 98.7  
23 explicitly provides that a plaintiff may bring a civil suit as an  
24 alternative to going through administrative procedures. See Cal.  
25 Lab. Code § 233(e) (providing that when an employee files a  
26 complaint, "the Labor Commissioner shall enforce the provisions  
27 of this section in accordance with . . . but not limited to,  
28 Sections 92, 96.7, 98, and 98.1 to 98.8, inclusive" and further

1 providing that “[a]lternatively, an employee may bring a civil  
2 action for the remedies provided by this section”) (emphasis  
3 added). Section 230 does not contain any similarly explicit  
4 language, indicating that the California legislature did not  
5 intend for employees seeking redress under that section to have  
6 the option of filing a civil suit without first going through the  
7 provided administrative procedures. Cf. Louise Gardens of Encino  
8 Homeowners' Ass'n, Inc. v. Truck Ins. Exch., Inc., 82 Cal. App.  
9 4th 648, 657 (2000) (“When one part of a statute contains a term  
10 or provision, the omission of a term or provision from another  
11 part of the statute indicates that the Legislature intended to  
12 convey a different meaning.”).

13 Accordingly, it appears that the language in section  
14 98.7(f) to the effect that section 98.7 does not preclude  
15 employees from pursuing remedies under any other law merely  
16 restates the general California rule that plaintiffs are not  
17 precluded from bringing civil actions based on California  
18 statutes after they have exhausted available administrative  
19 remedies. Section 98.7(f) should not be read, as plaintiff  
20 suggests, to allow employees to immediately file civil suits  
21 based on the provisions of the Labor Code in lieu of first  
22 pursuing the provided administrative remedies when the  
23 substantive Labor Code provision at issue, here section 230, does  
24 not explicitly authorize a direct civil suit as an alternative to  
25 the use of administrative procedures.<sup>3</sup>

26  
27 <sup>3</sup> Plaintiff contends that “as with wage and hour claims  
28 under the California Labor Code, an individual may maintain a  
civil action to enforce his or her rights in lieu of the

1                   Second, requiring an employee to exhaust the  
2 administrative remedies available under section 98.7 before  
3 pursuing a statutory claim under section 230 in a civil suit also  
4 furthers the public policies underlying the administrative  
5 exhaustion requirement by allowing the administrative agency, in  
6 this case the Division of Labor Standards Enforcement, to apply  
7 its expertise in the area of violations of the Labor Code. See  
8 Rojo v. Kliiger, 52 Cal. 3d 65, 86 (1990) ("[E]xhaustion of  
9 administrative remedies furthers a number of societal and  
10 governmental interests, including: (1) bolstering administrative  
11 autonomy; (2) permitting the agency to resolve factual disputes,  
12 apply its expertise and exercise statutorily delegated remedies;  
13 (3) mitigating damages; and (4) promoting judicial economy.").

14                   At the hearing on this motion, counsel for plaintiff  
15 argued that exhaustion is not required here because the statute  
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17 administrative remedies provided by the Labor Code." The  
18 relevance of the sections of the Labor Code plaintiff cites in  
19 support of this proposition is dubious. First, these sections,  
20 unlike section 230, do not incorporate section 98.7. Second,  
21 these sections, again unlike section 230, explicitly provide  
22 certain parties with the ability to bring civil actions. See  
23 Cal. Lab. Code § 218 ("Nothing in this article shall limit the  
24 right of any wage claimant to sue directly or through an assignee  
25 for any wages or penalty due him under the article."); Cal. Lab.  
26 Code § 229 ("Actions to enforce the provisions of this article  
27 for the collection of due and unpaid wages claimed by an  
individual may be maintained without regard to existence of any  
private agreement to arbitrate."); Cal. Lab. Code § 1194(a)  
("Notwithstanding any agreement to work for a lesser wage, any  
employee receiving less than the legal minimum wage or the legal  
overtime compensation applicable to the employee is entitled to  
recover in a civil action the unpaid balance of the full amount  
of this minimum wage or overtime compensation . . ."). These  
provisions bolster the conclusion that, where the California  
legislature intended the option of a direct civil suit to be  
available to redress violations of provisions of the Labor Code,  
it expressly indicated that intent.

1 at issue, unlike FEHA, does not contain a provision expressly  
2 stating that exhaustion of administrative remedies is always  
3 required before a civil action may be brought.<sup>4</sup> This argument is  
4 unpersuasive in light of: (1) the general rule that exhaustion of  
5 administrative remedies is required before a statutory claim can  
6 be brought; (2) the statutory framework encompassing section  
7 98.7; and (3) the public policies underlying the exhaustion  
8 requirement.

9           In sum, the court concludes that plaintiff must exhaust  
10 the administrative remedies provided in section 98.7 before  
11 bringing a civil claim under section 230. Plaintiff has not  
12 alleged, nor does she contend that she can allege, that she has  
13 exhausted administrative remedies. Accordingly, plaintiff's  
14 cause of action under section 230(a) is not properly before the  
15 court.<sup>5</sup>

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19           <sup>4</sup> In her opposition, plaintiff appeared to take the  
20 position that exhaustion is not required in this case because  
21 section 98.7(a) states that an employee "may file" a complaint  
22 with the Division of Labor Standards Enforcement. Counsel  
23 appeared to retreat from that position at the hearing on the  
24 motion. Counsel was wise to abandon the argument because it was  
25 not a strong one. FEHA also states that a person "may file" a  
complaint with the relevant department. Cal. Gov't Code  
§ 12960(b). Despite this use of the word "may" in Government  
Code section 12960(b), the California courts have consistently  
held that administrative remedies must be exhausted before a  
civil claim may be filed under FEHA. See, e.g., Rojo, 52 Cal. 3d  
at 84; Medix Ambulance Serv., Inc. v. Superior Ct., 97 Cal. App.  
4th 109, 116 (2002).

26           <sup>5</sup> Because the court has determined that plaintiff has not  
27 met the exhaustion requirement, it need not address the issue of  
28 whether plaintiff's cause of action under section 230(a) is time-  
barred.

1 IT IS THEREFORE ORDERED that defendant's motion for  
2 judgment on the pleadings as to plaintiff's cause of action under  
3 California Labor Code section 230 be, and the same hereby is,  
4 GRANTED.

5 DATED: July 3, 2003

  
6 WILLIAM B. SHUBB  
7 UNITED STATES DISTRICT JUDGE

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United States District Court  
for the  
Eastern District of California  
July 3, 2003

\* \* CERTIFICATE OF SERVICE \* \*

2:03-cv-00656

Gutierrez

v.

RWD Technologies Inc

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

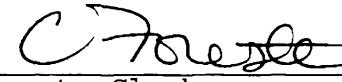
That on July 3, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY:   
Deputy Clerk

United States District Court  
for the  
Eastern District of California  
July 24, 2003

\* \* CERTIFICATE OF RE-SERVICE \* \*

2:03-cv-00656

Gutierrez

v.

RWD Technologies Inc

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 24, 2003, I RE-SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

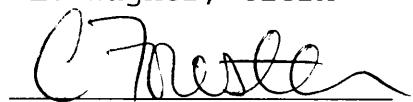
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BY:

  
Deputy Clerk